FILED
OCT 8 1958
JAMES R. BROWNING, Clerk

No. 346

In the Supreme Court of the United States

OCTOBER TERM, 1958

CARLO KELLY GIACONA, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 15-28) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (R. 278), and a petition for a rehearing was denied August 11, 1958 (R. 283). The petition for a writ of certiorari was filed on September 8, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A narcotics agent, having information that petitioner possessed marihuana, looked under petitioner's elevated place of business and found marihuana. The question is whether a search warrant based on knowledge so obtained is valid.

STATEMENT

A six-count indictment filed May 13, 1957, in the United States District Court for the Southern District of Texas charged petitioner with violations of the marihuana laws (R. 5-8). Following jury trial, petitioner was found guilty of receiving marihuana without having paid the transfer tax in violation of 26 U.S.C. 4744 (a) (1) (Count 1), and possession and concealment of marihuana in violation of 26 U.S.C. 4744 (a) (2) (Count 2) (R. 246). He was sentenced to five years imprisonment for each offense, the sentences to be concurrent (R. 247). On appeal, the Court of Appeals affirmed.

The facts relating to the issue raised by petitioner may be summarized as follows:

1. On March 26, 1957, federal narcotics agent William T. Finley received information,[1] that petitioner was concealing marihuana under his combination beer parlor and grocery store in Houston, Texas (R. 31-32, 34, 58-59, 83-85). At about 11:45 p.m. that evening, Finley, narcotics agent Montague, and a local police officer established a surveillance at the Mecca Drive-

[1] Defense counsel objected to any disclosure of the information received or the identity of the informer when the government attempted to disclose (R. 98).

in, petitioner's place of business (R. 34-35). The building itself is elevated about two and one half feet above the ground and rests on cinder block columns (R. 39-40).

At about 2:00 a.m. that morning (March 27, 1957), agent Finley crawled under the open area under the building and found a paper bag containing marihuana on top of one of the columns (R. 39-41, 185-186). After removing a sample of marihuana and initialing the bag, Finley returned the contraband to the top of the column (R. 41-43). The officers then continued their surveillance (R. 44).

Agent Finley called agent Engelking about 6:00 a.m. on March 27, 1957 (R. 44), and the latter obtained a 24-hour search warrant from the United States Commissioner that day (R. 10-12). In his affidavit (R. 8-10), agent Engelking grounded his request for the warrant on the basis that:

> Information from a reliable source was received that marihuana contained in tobacco cans and a sack were concealed under the above described building and inside one of the above described buildings. The marihuana has been located under the building by Narcotic Agent, W. T. Finley.

The officers—their strength augmented by the arrival of agents Bautista and Engelking—maintained their watch over the Mecca Drive-in throughout the day and saw petitioner come and go several times (R. 45-47). At about 8:00 p.m. that evening, petitioner approached the place where the marihuana was secreted, reached underneath the building, and picked

up the bag containing marihuana (R. 148-149, 174).[2] Agent Engelking turned on the lights of his government automobile, thus illuminating the scene, and drove into the driveway of petitioner's place of business (R. 48, 149, 175). Petitioner "stooped down and threw something underneath this building, and then he ran around the corner," with the officers in pursuit (R. 49, 176). The officers circled the building and entered the front door[3] where they found and arrested petitioner (R. 128-130, 150-151). Later, one of the officers crawled under the Drive-in and recovered the bag of marihuana (R. 114-115). When petitioner was interrogated concerning the marihuana, he told agent Finley that "I am not going to claim it, but I am lying." (R. 58.)

2. Petitioner did not make a motion to suppress the marihuana prior to trial. During trial he objected to the admission in evidence of the bag of marihuana, the sample obtained from it by Finley and the tobacco cans filled with marihuana[4] which were found under the building after petitioner was arrested (R. 40-42, 52, 110, 207-212, 221, 223).[5]

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[2] The agents were using special glasses for night viewing (R. 38, 174).

[3] Since there were customers present it is inferable that the officers entered during normal business hours (R. 151-152, 196, 202).

[4] Petitioner was acquitted of the counts founded on the tobacco cans (R. 6-8, 246).

[5] As to the sample, which was Government Exhibit No. 1, defense counsel said "I am objecting to any evidence on the premises of a defendant, without a search warrant." (R. 40). As to the bag of marihuana (Government Exhibit No.

Although the trial court was aware that he had discretion either to reject the motion to suppress as untimely or to pass on its merits (R. 214-215), he gave no reason for his decision overruling the motion (R. 221, 225). The Court of Appeals held that the warrant was valid since the agent's entry upon the driveway around and the ground under petitioner's place of business, although perhaps a trespass, was not an unreasonable search and seizure (Pet. 24-26).

ARGUMENT

Petitioner's entire argument depends on a premise (Pet. 6-7) not supported by the evidence, for the facts show that agent Finley did not search petitioner's place of business without a warrant. Acting on specific information which he had received, the agent looked under the Mecca Drive-in, which was elevated above the ground, and found a bag of marihuana resting on top of one of the pilings which supported the building. As noted by the Court of Appeals (Pet. 26), he did not enter, and made no attempt to enter, the constitutionally protected area inside the building until after a proper search warrant had been obtained.

This Court long ago held in *Hester* v. *United States*, 265 U.S. 57, 59, that a trespass upon land by federal agents does not vitiate a search and seizure, and in

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2), he claimed that the affidavit upon which the search warrant was based was insufficient because agent Engelking had only information and belief. He did not question the manner in which Finley obtained the information passed on to Engelking (R. 110, 207-210, 211, 212) until after the court had overruled his motion to suppress (R. 221, 223).

Agnello v. *United States*, 269 U.S. 20, that federal officers may, for investigation, look in windows to obtain information.

In the latter case, two covert employees of the government, accompanied by six revenue agents and a city policeman, went to the home of one Alba, at Alba's invitation, to buy narcotics. The officers outside looked through the windows while an exchange of money for narcotics took place and then rushed in and made the arrests which were held valid and sufficient to support a search incident thereto. 269 U.S. at 28-29, 30. On those facts it is apparent that the officers outside the house were trespassing upon land while looking through the windows, but the Court did not regard that fact as significant. Agent Finley's search under petitioner's place of business [6] was even less an invasion of privacy than the surveillance in *Agnello*, since he neither entered nor looked into the constitutionally protected area.

In a case such as this, where the building is elevated above the ground, the underside is simply one of its outside walls. An officer may place a detectaphone against the outside wall to hear conversations inside, *Goldman* v. *United States*, 316 U.S. 129, and look through windows, *Agnello* v. *United States*, *supra*, or chinks in the wall, *Martin* v. *United States*,

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[6] Cases such as *Hobson* v. *United States*, 226 F. 2d 890, 891 (C.A. 8), and *Care* v. *United States*, 231 F. 2d 22 (C.A. 10), certiorari denied, 351 U.S. 932, dealing with what is or is not within the curtilage of a dwelling house, do not apply to business establishments, even during non-business hours. *United States* v. *Hayden*, 140 F. Supp. 429, 435 (D. Md.); *United States* v. *Vlahos*, 19 F. Supp. 166, 170 (D. Ore.).

155 F. 2d 503, 505 (C.A. 5). He may also observe contraband or stolen articles lying next to a porch or wall. *Ellison* v. *United States*, 206 F. 2d 476 (C.A. D.C.). No more than that was done here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1958.

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